

FILED
COURT OF APPEALS DIV. #1
STATE OF WASHINGTON
2006 OCT -3 PM 4:44

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,
Respondent,

v.

JOHN COLEMAN,
Petitioner.

No. 77706-3

MOTION TO STRIKE
NEW ISSUE ARGUED
IN RESPONDENT'S
SUPPLEMENTAL
BRIEF

BY C. J. HERRITT
CLERK

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STATE OF WASHINGTON
OCT 10 2006

I. STATEMENT OF RELIEF SOUGHT

Mr. Coleman asks this Court to strike the Respondent's argument in its Supplemental Brief (filed August 2, 2006) that, on remand, based on State v. Davis, ___ Wn. App. ___, (Nos 23834-2-III, and 24313-3-III), and under authority of CrR 6.16(b), the State in Mr. Coleman's case may be permitted to submit special verdict forms to the jury concerning aggravating circumstances for purposes

of an exceptional sentence. This argument was not raised in Respondent's Answer to Mr. Coleman's Petition for Review and this Court's grant of Mr. Coleman's Petition for Review therefore did not accept review of that issue, as it was never presented to this Court. Mr. Coleman further asks that this Court order that the State of Washington may not present oral argument on that issue at the hearing on this case set for October 17, 2006.

II. ARGUMENT

RAP 13.7(b) provides that "the Supreme Court will review only the questions raised in . . . the petition for review and the answer, unless the Supreme Court orders otherwise" See Denaxas v. Sandstone Court of Bellevue, L.L.C., 148 Wn.2d 654, 671, 63 P.3d 125 (2003) (an issue first raised in a supplemental brief is not within the scope of review).

In the present case, the Court of Appeals reversed one of Mr. Coleman's two convictions based on the trial court's failure to give a unanimity instruction as required by State v. Petrich.¹ The Court also reversed both of Mr. Coleman's exceptional sentences under State v. Hughes, 154 Wn.2d 118, 110 P.3d 192 (2005), and ordered remand for imposition of standard range terms.

¹State v. Petrich, 101 Wn.2d 566, 569, 683 P.2d 173 (1984).

In the State's Answer to Mr. Coleman's Petition for Review, the State first answered Mr. Coleman's arguments that the trial court's failure to give a unanimity instruction as required by State v. Petrich required reversal of both of Mr. Coleman's convictions, not just one of those convictions as the Court of Appeals ordered.

Second, the State argued that the trial court, on remand for re-trial, could submit the question of aggravating circumstances to the jury, on ground that the Legislature, per Laws of 2005, ch. 68, had created a procedure for juries to find aggravating circumstances. The State noted that the issue of retroactive application of this new statute (to cases occurring before its passage) was before this Court in State v. Base, No. 76081-1. The State proceeded to offer argument on that issue of whether these amendments to the SRA should apply retroactively. Answer to Petition for Review, at pp. 5-7. The State specifically argued that the SRA amendments should apply retroactively because the amendments were "remedial" and "procedural." Answer to Petition for Review, at pp. 5-7 (citing Macumber v. Shafer, 96 Wn.2d 568, 570, 637 P.2d 645 (1981) and Miebach v. Colasurdo, 102 Wn.2d 170, 180, 685 P.2d 1074 (1984)). These arguments are the sort advanced in making the usual argument that a criminal statute

should be applied retroactively, despite the usual presumption that new statutes are presumed to apply prospectively only.

However, subsequently, in the State's Supplemental Brief, filed on the same date of July 31, 2006 as Mr. Coleman's Supplemental Brief and received by the Petitioner by mail service on August 2, 2006, the Respondent offered an additional, new argument, arguing as follows:

Even if the 2005 amendments to the SRA do not apply, there is clear authority permitting a trial court to submit to the jury a special verdict form concerning aggravating circumstances at trial.

(Emphasis added.) State's Supplemental Brief, at p. 17. The State continues on to cite various cases and authorities, including State v. Davis, ___ Wn. App. ___, (Nos 23834-2-III, and 24313-3-III), and CrR 6.16(b), in support of this proposition.

This argument is an entirely new argument, that was not raised in the State's Answer to Mr. Coleman's Petition for Review.

Undersigned counsel telephoned the State's counsel after the filing of the State's original Answer, to question why the State was raising an argument regarding retroactivity of the SRA amendments when that precise issue was already set to be decided by this Court in State v. Base, supra, and State v. Pillatos, No. 75984-7. State's

counsel described his idea of an issue that, in all honesty, undersigned counsel did not fully understand, having to do with the trial court's authority absent retroactivity. Undersigned counsel thereafter spent several days closely examining the argument and cases advanced in the State's Answer, and consulting extensively with several colleagues at the Washington Appellate Project attempting to ascertain the argument that the State was purporting to proffer in its Answer. After significant examination of the State's Answer and all the authorities cited therein, it became manifestly clear that the only argument made by the State in its Answer was that the SRA amendments should apply retroactively.

This is the argument to which Mr. Coleman has responded in his Supplemental Brief. Supplemental Brief of Petitioner, at pp. 18-32. That response was significant in its necessary length and required the Petitioner to seek leave of this Court to file an overlength Supplemental Brief. Undersigned counsel is not at this time acquainted with the applicable law pertaining to the entirely new argument raised by the State for the first time in its Supplemental Brief, and is not prepared to argue that new issue, in addition to the significant, complex issues already raised in his Petition and in the State's Answer. RAP 13.7(b) prohibits the State's

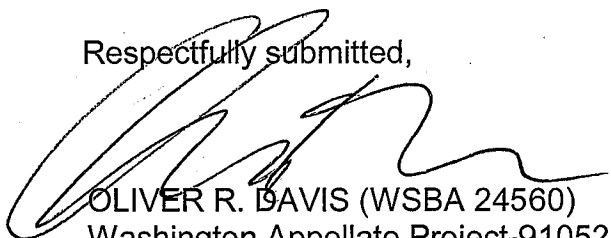
late interjection of this entirely new issue into Mr. Coleman's case, and Mr. Coleman, through undersigned counsel, respectfully asks that this Court strike that portion of the State's Supplemental Brief raising this issue.

III. CONCLUSION

Mr. Coleman, through undersigned counsel, therefore respectfully requests this Court grant his motion to strike as described herein.

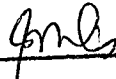
DATED this 3 day of October, 2006.

Respectfully submitted,


OLIVER R. DAVIS (WSBA 24560)
Washington Appellate Project-91052
Attorneys for Petitioner

Today I deposited in the mail of the United States of America a properly stamped and addressed envelope directed to the attorneys of record of plaintiff/defendant containing a copy of the document to which this declaration is attached.

I declare under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.


Name

OCT - 3 2006

Date

Done in Seattle, Washington

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